RECORD
AND
BRIEFS

No. 14-15

In the Supreme Court of the United States

RICHARD ARMSTRONG, ET AL., PETITIONERS

v.

EXCEPTIONAL CHILD CENTER, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Under 42 U.S.C. 1396a(a)(30)(A), a State's plan for medical assistance under the Medicaid Act must "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary * * * to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." The question presented is:

Whether Medicaid providers may maintain a cause of action under the Supremacy Clause to enforce Section 1396a(a)(30)(A) by asserting that it preempts a State's allegedly inconsistent provider-reimbursement rates.

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INTEREST OF THE UNITED STATES

This case concerns whether Medicaid providers can bring a federal cause of action directly under the Supremacy Clause to enjoin state Medicaid reimbursement rates as inconsistent with 42 U.S.C. 1396a(a)(30)(A). The United States participated as *amicus curiae* in *Douglas* v. *Independent Living Center of Southern California, Inc.*, Nos. 09-958, 09-1158, and 10-283, in which the same question was presented, but the Court ultimately vacated and remanded on other grounds. 132 S. Ct. 1204 (2012).

STATEMENT

1. a. The Medicaid program, established in 1965 by Title XIX of the Social Security Act (SSA), 42 U.S.C. 1396 *et seq.*, is a cooperative federal-state program to provide medical care to needy individuals.

Douglas v. *Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1208 (2012); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). Medical providers who furnish services under Medicaid receive payment directly from the States, and the federal government in turn reimburses States for a fixed percentage of the expenses that they incur on behalf of Medicaid-eligible individuals. 42 U.S.C. 1396b. State participation in Medicaid is voluntary, but those States that elect to participate must comply with requirements imposed by the Medicaid Act and by the Secretary of Health and Human Services (HHS) in her administration of the Act. See 42 U.S.C. 1396a; *Douglas*, 132 S. Ct. at 1208; *Wilder*, 496 U.S. at 502. Within those limits, however, each State enjoys great flexibility in designing and administering its own program. *Alexander* v. *Choate*, 469 U.S. 287, 303 (1985).

To qualify for federal funds, participating States must submit to the Secretary, through the Centers for Medicare & Medicaid Services (CMS), a "plan for medical assistance" detailing the nature and scope of the State's Medicaid program and demonstrating its compliance with the Medicaid Act. 42 U.S.C. 1396a(a); 42 C.F.R. 430.10; *Wilder*, 496 U.S. at 502. Among other requirements, a State's plan must

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that

> such care and services are available to the general population in the geographic area.

42 U.S.C. 1396a(a)(30)(A) (Section 30(A)). The Secretary reviews the State's plan, and any subsequent amendment thereto, and determines whether it complies with statutory and regulatory requirements. 42 U.S.C. 1316(a)(1) and (b), 1396a(b); 42 C.F.R. 430.10 *et seq.* If the Secretary disapproves the plan or plan amendment, the State can seek reconsideration and, ultimately, judicial review in the court of appeals. See 42 U.S.C. 1316(a)(2)-(5) and (b); 42 C.F.R. 430.18, 430.38, 430.60 *et seq.* If the State does not act in compliance with an approved plan, the Secretary may initiate a compliance action and withhold federal funds. 42 U.S.C. 1396c; 42 C.F.R. 430.35.

b. Congress has enacted a "waiver" program permitting States to apply to CMS for permission to provide home or community-based services (HCBS) as part of the "medical assistance" furnished under a state plan. 42 U.S.C. 1396n(c); 42 C.F.R. 430.25(c)(2), 440.180-440.181, 441.300 *et seq.* The waiver program authorizes States to provide a range of services "to individuals who would otherwise require institutional care." *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 601 n.12 (1999). Among other things, a State may obtain a waiver to provide residential "habilitation" services to qualifying beneficiaries if the State demonstrates that the cost of caring for those individuals in an HCBS program would not exceed the cost of institutional care. Pet. App. 17; 42 U.S.C. 1396n(c)(4)(B) and (5); 42 C.F.R. 440.180(b)(6). A waiver granted by CMS is provided for a three-year term and may be

renewed for five-year terms. 42 C.F.R. 430.25(h)(2)(i) and (h)(3), 441.304.[1]

As with state plans, a State may amend its waiver program from time to time, subject to federal review and approval. 42 C.F.R. 430.25(f)(1). The State or CMS may terminate a waiver program at any time with 30 days' notice. 42 C.F.R. 441.307. If CMS decides to terminate a waiver, the State may request review of that decision under the same procedures applicable to the disallowance of a state plan or plan amendment. See 42 C.F.R. 441.308.

c. The State of Idaho has a CMS-approved HCBS waiver program to provide residential habilitation services to individuals with developmental disabilities. Pet. App. 17; cf. 42 C.F.R. 430.25(c)(2), 440.150, 441.301. The waiver program includes individually tailored support services, such as skills training, that are "designed to assist eligible participants to reside successfully in the community." Reply Br. App. 3-4.

In 2006, the State modified the reimbursement rates for services provided under its HCBS waiver program. Pet. App. 17. Thereafter, as required by state law, Idaho officials developed a revised payment rate methodology that considered the actual costs incurred by providers. *Id.* at 18; Reply Br. App. 5-6; see Idaho Code Ann. § 56-118(1)-(2) (2006) (requiring a "methodology for reviewing and determining reimbursement rates to private businesses providing * * * residential habilitation agency services" that

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[1] CMS recently issued a final rule amending in certain respects the procedures and requirements for obtaining or renewing an HCBS waiver. 79 Fed. Reg. 2948 (Jan. 16, 2014) (amending 42 C.F.R. 441.301 *et seq.*). Those changes do not bear upon the issues in this case.

"incorporate[s] * * * the actual cost of providing quality services"). In 2009, state officials proposed to the Idaho legislature that the relevant reimbursement rates be increased consistent with that revised methodology. Pet. App. 18; Reply Br. App. 7-8.[2] The Idaho legislature did not appropriate the necessary funds, however, and reimbursement rates remained at 2006 levels. Pet. App. 12, 19; Reply Br. App. 8.

2. a. Respondents (plaintiffs below) are five corporations that provide residential habilitation services to Medicaid beneficiaries in Idaho. Pet. App. 16. Petitioners are two officials responsible for administration of the State's Medicaid program. *Ibid.*

In 2009, respondents filed suit in federal district court in Idaho, claiming that the applicable reimbursement rates for residential habilitation services were too low to satisfy the requirements of Section 30(A) and for that reason were "preempted" by that provision of the Medicaid Act. Respondents sought an injunction ordering the State to implement the revised rates that were proposed, but not adopted, in 2009. Pet. App. 11. The parties stipulated to all relevant facts, see Reply Br. App. 1-10, and filed cross motions for summary judgment. Pet. App. 15, 20.

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[2] In December 2009, the State submitted a waiver amendment advising CMS of the State's intent eventually to implement a revised payment methodology consistent with Idaho Code Ann. § 56-118 (2006). See Reply Br. App. 14-17. That waiver amendment did not, however, alter the payment methodology then in effect and approved by CMS. Thus, contrary to respondents' assertions, see Br. in Opp. 7-8, CMS's approval of the State's December 2009 waiver amendment has no bearing on the posture or outcome of this litigation.

b. The district court granted summary judgment in respondents' favor. Pet. App. 15-24. The court rejected petitioners' suggestion that respondents lacked a valid cause of action, holding, based on Ninth Circuit precedent, that "providers have standing under the Supremacy Clause to challenge a state law reducing reimbursement rates, as preempted by [Section 30(A)]." *Id.* at 23 (citing *Indep. Living Ctr. of S. Cal., Inc.* v. *Shewry*, 543 F.3d 1050, 1065 (9th Cir. 2008), cert. denied, 557 U.S. 920 (2009)). On the merits, the court acknowledged that the stipulated facts "appear[ed] to support" the State's contention that the reimbursement rates remained "consistent with" the substantive criteria of Section 30(A), including efficiency, economy, quality of care, and beneficiary access to services. *Id.* at 22 (citation and quotation marks omitted). Nonetheless, relying upon *Orthopedic Hospital* v. *Belshe*, 103 F.3d 1491 (9th Cir. 1997), cert. denied, 522 U.S. 1044 (1998), the court held that the State's continued use of the 2006 reimbursement rates was unlawful because the rates did not reflect sufficient consideration of "actual provider costs," Pet. App. 22, and because the legislature's refusal to adopt the higher rates proposed in 2009 was motivated by "budgetary concerns," *id.* at 21-22 (citing *Belshe*, 103 F.3d at 1499 n.3).

The district court denied reconsideration, Pet. App. 7-14, and entered a judgment directing the State to "implement immediately" an increase in the applicable reimbursement rates. *Id.* at 5-6.

c. The court of appeals affirmed by unpublished disposition. Pet. App. 1-4. The court held that respondents "have an implied right of action under the Supremacy Clause to seek injunctive relief against the

enforcement or implementation of state legislation." *Id.* at 2. Acknowledging that four Justices of this Court "would have held otherwise" in *Douglas*, *id.* at 3 (citing 132 S. Ct. at 1212 (Roberts, C.J., dissenting)), the court of appeals nonetheless considered itself bound by circuit precedent and by "prior holdings of the Supreme Court * * * that have recognized a private right of action under the Supremacy Clause." *Ibid.* (citing *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983)). The court expressed some doubt that a State's inaction (*i.e.*, its failure to increase rates) could be "preempted under the Supremacy Clause," *id.* at 4 n.2, but held that petitioners had forfeited any argument in this respect.

On the merits, the court of appeals reaffirmed its understanding that Section 30(A) "require[s] that reimbursement rates bear a reasonable relationship to provider costs." Pet. App. 3 (citing *Belshe*, 103 F.3d at 1499). The court also affirmed the district court's conclusion that the State's reimbursement rates had impermissibly "remained in place for 'purely budgetary reasons.'" *Id.* at 4.[3] It accordingly affirmed the grant of summary judgment to respondents. *Ibid.*

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[3] The panel did not attempt to reconcile this holding with the Ninth Circuit's earlier decision in *Managed Pharmacy Care* v. *Sebelius*, 716 F.3d 1235 (2013), cert. denied, 134 S. Ct. 900, and 134 S. Ct. 986 (2014), in which the court had deferred to CMS's interpretation that Section 30(A) does not require States to prepare or rely upon provider cost studies in setting provider reimbursement rates. See *id.* at 1245-1250 ("join[ing]" those circuits that "have agreed that § 30(A) does not require any 'particular methodology' for satisfying its substantive requirements" (citation and quotation marks omitted)).

SUMMARY OF ARGUMENT

A. Respondents do not dispute that Medicaid providers possess no statutory private right of action to enforce 42 U.S.C. 1396a(a)(30)(A)—either under 42 U.S.C. 1983 (Section 1983) or directly under the Medicaid Act. Section 30(A) does not confer on providers any individual right; nor does it entitle them to a certain level of payments that would be enforceable under this Court's decision in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). Instead, Section 30(A) offers only broad criteria to guide HHS's and the States' determinations regarding the adequacy of the methods and procedures set out in a State's Medicaid plan.

B. This Court has never squarely decided if or when a private party has a cause of action to enjoin operation of state laws as preempted by a federal statute that itself contains no private right of action and confers no individual rights enforceable under Section 1983. The Court has, however, decided dozens of preemption claims against state officials on their merits in cases brought in federal court, perhaps implicitly assuming that a federal cause of action exists in some circumstances. Although the Court has not directly explored the nature or source of the cause of action, its cases reflect a longstanding judicial practice: private parties may bring a suit in federal court to enjoin state regulatory action from which the plaintiffs claim immunity under federal law.

C. The present case does not require the Court either to reexamine that practice or otherwise attempt exhaustively to catalog the range of circumstances under which a nonstatutory cause of action may be available to enjoin state officials from violating federal law. Even assuming that a nonstatutory cause of

action is available in other circumstances, recognition of a private right of action under the Supremacy Clause in *this* case would be incompatible with the statute, the methods for its enforcement, and respondents' claim.

First, Section 30(A) is part of a cooperative federal-state program enacted pursuant to Congress's Spending Clause authority. In such an arrangement, Medicaid providers are akin to third-party beneficiaries. Under traditional principles, third parties have judicially enforceable contract rights only where, unlike here, the contract was intended to confer on them a legally enforceable right.

Second, the language and structure of Section 30(A) confirm that private enforcement by Medicaid providers would not be appropriate. The statute provides little guidance to courts about how to apply and balance its general, and sometimes competing, policy objectives. It therefore calls for interpretation and evaluation by the responsible agency, rather than private judicial enforcement.

Third, the shared assumption of this Court and Congress with respect to federal-state programs under the SSA has been that private enforcement under a nonstatutory cause of action is not available. If respondents' contrary view were correct, then several prior rulings of this Court regarding the unavailability of an implied right of action and a suit under Section 1983 could easily have been circumvented. Amendments to the SSA, enacted by Congress in 1994, similarly reflect the understanding that the SSA's state plan provisions are not privately enforceable.

Finally, respondents do not assert the type of preemption claim previously entertained by this Court

on the basis of a nonstatutory cause of action: respondents face no affirmative enforcement action by the State in which federal preemption would have been a defense at law, nor do they seek immunity from allegedly preempted state regulation.

ARGUMENT

MEDICAID PROVIDERS CANNOT MAINTAIN A CAUSE OF ACTION UNDER THE SUPREMACY CLAUSE TO ENFORCE SECTION 30(A) AGAINST STATE OFFICIALS

The Department of Health and Human Services is committed to ensuring that state Medicaid programs afford beneficiaries meaningful access to covered care and services. It is essential under Section 30(A) that States carefully consider what impact payment rates may have on the availability of providers sufficient to furnish covered care and services to Medicaid beneficiaries.[4]

The question in this case, however, does not concern the States' substantive obligations under Section 30(A), but instead whether Medicaid providers have a private right of action directly under the Supremacy Clause to sue state officials to enjoin the operation of state laws that are assertedly not in compliance with Section 30(A). As we explain below, given the features of Section 30(A) and the statutory scheme

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[4] In 2011, HHS promulgated a proposed rule to "create a standardized, transparent process for States to follow as part of their broader efforts to" comply with Section 30(A). 76 Fed. Reg. 26,342 (May 6, 2011). Nearly 200 comments were submitted in response to the proposed rule. HHS has informed this Office that it continues to proceed with the rulemaking and currently intends to issue a final rule within the coming year.

in which it appears, no such private right of action is available.

A. No Federal Statute Provides A Cause Of Action To Enforce Section 30(A) Against State Officials

Respondents do not assert any private right of action to enforce Section 30(A) under 42 U.S.C. 1983 or under the Medicaid Act itself. Nor have they disputed that no such statutory cause of action exists under this Court's precedents.

1. To seek redress under Section 1983, "a plaintiff must assert the violation of a federal right, not merely a violation of federal law." *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997) (emphasis omitted). In *Blessing*, the Court set forth three "factors" for courts to consider in deciding whether a statute confers a right enforceable under Section 1983: (1) whether Congress "intended that the provision in question benefit the plaintiff," (2) whether "the right assertedly protected by the statute is" "so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) whether the provision is "couched in mandatory, rather than precatory, terms." *Id.* at 340-341 (citations omitted). In *Gonzaga University* v. *Doe*, 536 U.S. 273, 283 (2002), the Court clarified that "anything short of an unambiguously conferred right" could not "support a cause of action brought under" Section 1983, and emphasized that only "rights, not the broader or vaguer 'benefits' or 'interests,' * * * may be enforced under the authority of that section." *Ibid.*

After *Gonzaga*, nearly every court of appeals to consider the issue, including the Ninth Circuit, has correctly held that Section 30(A) does not confer on Medicaid providers individual rights enforceable under 42 U.S.C. 1983. See *Equal Access for El Paso*,

Inc. v. *Hawkins*, 509 F.3d 697, 703-704 (5th Cir. 2007), cert. denied, 555 U.S. 811 (2008); *Mandy R.* v. *Owens*, 464 F.3d 1139, 1147-1148 (10th Cir. 2006), cert. denied, 549 U.S. 1305 (2007); *Westside Mothers* v. *Olszewski*, 454 F.3d 532, 542-543 (6th Cir. 2006); *New York Ass'n of Homes & Servs. for the Aging* v. *DeBuono*, 444 F.3d 147, 148 (2d Cir. 2006) (per curiam); *Sanchez* v. *Johnson*, 416 F.3d 1051, 1058-1062 (9th Cir. 2005); *Long Term Care Pharmacy Alliance* v. *Ferguson*, 362 F.3d 50, 58-59 (1st Cir. 2004). But see *Pediatric Specialty Care, Inc.* v. *Arkansas Dep't of Human Servs.*, 443 F.3d 1005, 1016 (8th Cir. 2006) (declining to reconsider circuit precedent holding that Section 30(A) is enforceable by providers and beneficiaries through Section 1983), cert. granted, judgment vacated in part, 551 U.S. 1142 (2007).

As the courts of appeals have concluded, Section 30(A) does not contain "the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Gonzaga*, 536 U.S. at 287 (citation omitted). Section 30(A) provides only that "methods and procedures" must be included in state plans "relating to" utilization and payment to assure that payments are "consistent with efficiency, economy, and quality of care" and are "sufficient to enlist enough providers so that care and services are available" at least to the extent that they "are available to the general population in the geographic area." 42 U.S.C. 1396a(a)(30)(A). That provision "has an aggregate focus" and is directed at the "overall methodology" of the state plan. *Sanchez*, 416 F.3d at 1059. It speaks of Medicaid providers not as rights holders, but as being "'enlisted' as subordinate partners in the administration of Medicaid services." *Ibid.* Like the

"substantial compliance" provision at issue in *Blessing*, Section 30(A) is a "yardstick" for designing and evaluating "systemwide performance" based on "the aggregate services provided by the State." 520 U.S. at 343 (emphasis omitted); see *ibid.* (concluding that "the requirement that a State operate its child support program in 'substantial compliance' with Title IV-D [of the SSA] was not intended to benefit individual children and custodial parents"). Section 30(A) thus does not itself unambiguously create an "*individual* entitlement to services." *Ibid.*

Moreover, as this Court and the courts of appeals have repeatedly noted, the language of Section 30(A) is "broad and general" in character. *Douglas* v. *Independent Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1210 (2012); accord *Sanchez*, 416 F.3d at 1060 ("'broad and diffuse'"); *Long Term Care Pharmacy Alliance*, 362 F.3d at 58 (similar). Neither the Medicaid Act nor any regulations promulgated by the Secretary identify a judicially administrable standard by which the statute's broad policy objectives—"efficiency," "economy," "quality of care," and "enlist[ing]" enough providers to make care and services "available * * * at least to the extent that such care and services are available to the general population in the geographic area," 42 U.S.C. 1396a(a)(30)(A)—are to be measured. Cf. *Blessing*, 520 U.S. at 340-341 (stating that enforcement of "vague and amorphous" provision "would strain judicial competence") (citation omitted); Gov't Br. at 15, *Belshe* v. *Orthopaedic Hosp.*, 521 U.S. 1116 (1997) (No. 96-1742) (making similar argument regarding "efficiency, economy, and quality of care"). Nor does Section 30(A) give any guidance as to how a court should balance such general,

and sometimes competing, policy objectives.[5] See *Sanchez*, 416 F.3d at 1059-1060.

Indeed, the assessment of a State's compliance with Section 30(A) necessarily turns on determinations and predictions of legislative fact of the sort appropriate for expert judgment by the State and CMS and for resolution in the course of their ongoing bilateral relationship. Cf. *Douglas*, 132 S. Ct. at 1210. Judicial interpretation and weighing of these objectives in private Section 1983 suits would require courts to make predictive and policy judgments in the first instance, supplant the expert role of CMS, and interfere with the flexibility Section 30(A) affords to the State and CMS in assessing performance and appropriate responses to deficiencies. Cf. *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment). Moreover, permitting such suits to proceed under Section 1983 would also "threaten[] to defeat the uniformity that Congress intended by centralizing administration of the federal program in [CMS]." *Douglas*, 132 S. Ct. at 1211.

2. It is also undisputed that the Medicaid Act itself does not afford providers a statutory cause of action to enforce Section 30(A) against noncompliant States. See *Maine* v. *Thiboutot*, 448 U.S. 1, 6 (1980) (stating that the SSA, of which the Medicaid Act is a part, "affords no private right of action against a State").

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[5] The proposed rule issued by the Secretary also does not provide "nationwide standards" or adopt a "singular approach" to compliance. 76 Fed. Reg. at 26,344. Instead, in view of "local variations" and other considerations, the proposed rule creates "Federal guidelines to frame alternative approaches for States to demonstrate consistency with [Section 30(A)'s] access requirements." *Ibid.*

Indeed, a court's "role in discerning whether personal rights exist in the implied right of action context" substantially resembles its inquiry "in discerning whether personal rights exist in the § 1983 context," as "[b]oth inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Gonzaga*, 536 U.S. at 285. Thus, "where the text and structure of a statute provide no indication that Congress intends to create new individual rights," as is the case here, "there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286; see *Suter* v. *Artist M.*, 503 U.S. 347, 363-364 (1992) (declining to recognize an implied statutory private right of action for the same reasons that led the Court to conclude that such a suit could not proceed under Section 1983).

B. This Court Has Never Squarely Decided If Or When A Nonstatutory Cause Of Action For Equitable Relief On Preemption Grounds Should Be Recognized Under The Supremacy Clause Or Otherwise, Although It Has Entertained Injunctive Actions Raising Preemption Claims In Certain Circumstances

1. This Court has never squarely decided if or when a federal court should create or recognize a cause of action for equitable relief directly under the Supremacy Clause in the absence of a federal statutory cause of action. To be sure, this Court has suggested that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, * * * presents a federal question which the federal courts have jurisdiction under 28 U.S.C.

§ 1331 to resolve." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); see *ibid.* ("[F]ederal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights."). But *Shaw* addressed only subject-matter jurisdiction, not the existence of a private right of action. Thus, contrary to the court of appeals' understanding, *Shaw* is not a "holding[]" of this Court "recogniz[ing] a private right of action under the Supremacy Clause." Pet. App. 3; see *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642-643 (2002) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case.") (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis omitted)); *Burks* v. *Lasker*, 441 U.S. 471, 476 & n.5 (1979) (the question whether a cause of action exists, unlike "a question of jurisdiction," may be assumed without being decided).

The Court has, however, decided the merits of dozens of preemption claims in cases brought against state officials in federal court—without identifying the basis for the underlying cause of action. *E.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Arkansas Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268 (2006); *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003); *Pharmaceutical Research & Mfrs. of America (PhRMA)* v. *Walsh*, 538 U.S. 644 (2003) (plurality opinion). These decisions could be read as implicitly assuming that a nonstatutory federal cause of action exists under some circumstances. But cf. *Steel Co.*, 523 U.S. at 91 ("[D]rive-by

jurisdictional rulings * * * have no precedential effect.").[6]

Some Members of the Court have expressed approval in some contexts of a federal cause of action to prevent enforcement against plaintiffs of an allegedly preempted state law in the absence of a right under Section 1983. See, *e.g.*, *Golden State Transit Corp.* v. *City of L.A.*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting) (plaintiffs may pursue preemption claim "by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes," because "[t]hese statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983") (citing 28 U.S.C. 1331, 2201, and 2202). Others have reached a contrary conclusion in the specific context of Section 30(A) suits, while acknowledging that the courts may exercise equitable authority in suits like *Ex parte Young*, 209 U.S. 123 (1908). See *Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting). But the Court has not, at least in modern times, directly addressed the circumstances in which a nonstatutory

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[6] In a number of this Court's preemption cases in which the cause of action was not discussed, the record discloses that the plaintiffs had asserted claims under Section 1983. See, *e.g.*, *Nat'l Foreign Trade Council* v. *Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998), aff'd 181 F.3d 38 (1st Cir. 1999), aff'd sub nom. *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Love* v. *Foster*, 90 F.3d 1026, 1028 (5th Cir. 1996), aff'd, 522 U.S. 67 (1997); J.A. at 4, *Cal. Dep't of Human Res. Dev.* v. *Java*, 402 U.S. 121 (1971) (No. 507); *Rosado* v. *Wyman*, 414 F.2d 170, 177 (2d Cir. 1969), rev'd, 397 U.S. 397 (1970). Others might have satisfied the standards for asserting "rights," "privileges," or "immunities" under Section 1983 even if that provision was not expressly invoked.

private right of action to enjoin state officials from enforcing a state statute, regulation, or policy that allegedly conflicts with, and is thus preempted by, federal law should be fashioned or recognized, or the basis for such a private right of action.

2. Nevertheless, the Court's cases do reflect a longstanding practice of entertaining suits by private parties in federal court to enjoin state regulation of primary conduct as to which the plaintiffs claim immunity under federal law. Cf. *Golden State Transit*, 493 U.S. at 113 (Kennedy, J., dissenting) (The Court has long permitted "a private party [to] assert an immunity from state or local regulation on the ground that the Constitution or a federal statute, or both, allocate the power to enact the regulation to the National Government, to the exclusion of the States.").

The suit in *Ex parte Young*, 209 U.S. 123 (1908), is an early example. Some have described *Ex parte Young* as invoking an accepted principle of equity jurisprudence: that a plaintiff could anticipatorily bring a suit in equity to bar an action at law against which the plaintiff in equity (the defendant in the prospective action at law) would have a valid defense. See *Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1642 (2011) (*VOPA*) (Kennedy, J., concurring) (describing the suit in *Ex parte Young* as "nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law," and citing John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989, 997-999 (2008)); cf. 4 John Norton Pomeroy, Jr., *Equity Jurisprudence* §§ 1360-1364 (4th ed.

1919); 1 C.L. Bates, *Federal Equity Procedure* § 540 (1901).[7]

Although the question now before the Court is whether respondents have an implied right of action "directly under the Supremacy Clause," Pet. i, this Court's cases suggest that the Supremacy Clause itself may not furnish the only, or even the best, understanding of or basis for the source of a nonstatutory cause of action to enjoin the enforcement of state action that is inconsistent with federal law—as distinguished from supplying the rule of decision on the merits (that federal law preempts conflicting state law) in a case otherwise properly before the court. The Supremacy Clause "is not a source of any federal rights," but rather it "'secures' federal rights by according them priority whenever they come in conflict with state law." *Golden State Transit*, 493 U.S. at 107 (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)) (brackets omitted); see *Douglas*, 132 S. Ct. at 1212 (Roberts, C.J., dissenting); *Dennis* v. *Higgins*, 498 U.S. 439, 450 (1991) (con-

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[7] The issue in *Ex parte Young* was not whether a cause of action existed; rather, it was whether a suit for prospective injunctive relief against a state official to enforce federal law would be barred by the State's Eleventh Amendment immunity from suit. The immunity principles established in *Ex parte Young* apply not only where the cause of action is judicially fashioned, as in *Ex parte Young* itself, but also where the cause of action is conferred by a federal statute, such as Section 1983. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *VOPA*, 131 S. Ct. at 1639 (quoting *Verizon Md.*, 535 U.S. at 645) (brackets omitted).

trasting Supremacy Clause with Commerce Clause in this respect); cf. *Swift & Co.* v. *Wickham*, 382 U.S. 111, 116-129 (1965). The Court's practice of entertaining affirmative preemption suits in federal court in certain circumstances may instead be better understood as rooted in the courts' historical exercise of equitable powers—from times predating the development of modern implied-cause-of-action jurisprudence—*e.g.*, to bring a suit in equity to assert preemptively a defense that otherwise would have been available in an action at law. See pp. 18-19, *supra*.[8] But regardless whether the underpinning of the Court's practice is a general equitable cause of action, the Supremacy Clause, or some other source of law, the ability of private parties to obtain protection in the face of state compulsion that violates federal law has considerable historical grounding and appropriately vindicates the supremacy of federal law. Cf. *Douglas*,

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[8] See *Bush* v. *Lucas*, 462 U.S. 367, 373 & n.10 (1983) (discussing "common-law approach to the judicial recognition of new causes of action"); *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001) (discussing development of Court's modern jurisprudence). That practice may have reflected a pre-*Erie* understanding that the "general" law recognized such suits in equity. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963) (noting federal courts' creation of common-law rights before *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938)). Or, perhaps relatedly, it may have reflected an understanding that the conferral of subject-matter jurisdiction on a federal court (including jurisdiction over suits in equity) itself allowed the court to exercise equitable authority in certain familiar circumstances. See *Golden State Transit*, 493 U.S. at 119 (Kennedy, J., dissenting); cf. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013) (discussing *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 724 (2004)). In any event, the practice is now well established and serves an important purpose in vindicating the supremacy of federal law.

132 S. Ct. at 1213 (Roberts, C.J., dissenting) (approving federal courts' "equitable powers to enforce the supremacy of federal law when such action gives effect to the federal rule").

C. The Creation Of A Private Cause Of Action To Enforce Section 30(A) Against State Officials Under The Supremacy Clause Would Not Be Appropriate

To resolve the question presented in this case, the Court need not decide as a general matter if or when a private party can bring a federal nonstatutory cause of action for equitable relief against state officials on preemption grounds—rooted in general equitable jurisprudence, under the Supremacy Clause, or otherwise. Nor need the Court reexamine past cases that reached the merits of preemption claims brought in federal court. We assume for present purposes that a nonstatutory cause of action is properly available to vindicate the supremacy of federal law in certain other circumstances. But there are particular reasons why creation of a private right of action based directly on the Supremacy Clause to enforce the federal statutory provision at issue here would not be compatible with the nature of the statute, the methods for its enforcement, and respondents' claim.

1. First, as a general matter, Section 30(A) is a provision of a cooperative federal-state program enacted pursuant to Congress's Spending Clause authority, and as to which Congress neither provided an express right of action for private parties nor conferred individually enforceable rights. Recognition of a nonstatutory cause of action for Medicaid providers in this setting would be in tension with the nature of the federal-state relationship under Medicaid.

This Court has often said that a law enacted pursuant to the Spending Clause operates "in the nature of a contract" between the federal government and the State. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981); see *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2602 (2012) (plurality) (Roberts, C.J.); *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006). Of course, this Court has also recognized that neither the federal statute itself nor the resulting arrangement with a fund recipient constitutes an ordinary contract. See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985).[9] But private parties who receive payment or other assistance through Spending Clause legislation are in a situation similar to that of third-party beneficiaries. Cf. *PhRMA*, 538 U.S. at 683 (Thomas, J., concurring in the judgment). Under traditional contract principles, third parties have judicially enforceable rights only if they are intended, rather than incidental, beneficiaries of the contract, and only if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties." Restatement (Second) of Contracts § 302(1) (1981). When the contract is a government contract, "[t]he distinction between an intention to benefit a third party and an intention that the third party

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[9] The Act of Congress establishing the joint federal-state program, for example, remains binding law with the full force and preemptive effect of federal legislation under the Supremacy Clause. *E.g.*, *Bennett* v. *Arkansas*, 485 U.S. 395, 397 (1988) (per curiam) (SSA preempts state law providing for attachment of federal benefits paid to state prisoners); *Philpott* v. *Essex Cty. Welfare Bd.*, 409 U.S. 413, 417 (1973) (SSA preempts state law requiring reimbursement through payment of federal disability benefits).

should have the right to enforce that intention" is vigorously enforced. 9 John E. Murray, Jr., *Corbin on Contracts* § 45.6, at 92 (rev. ed. 2007); see *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230-231 (1912). In light of Congress's decision not to confer individual rights or a statutory right of action in a Spending Clause provision like Section 30(A), see pp. 11-15, *supra*, the analogy to third-party beneficiaries counsels against creating a nonstatutory right of action under the Supremacy Clause to enforce that provision.

2. The text and structure of Section 30(A) also confirm that creating or recognizing a private right of action for Medicaid providers against state officials would not be appropriate. Courts of appeals have found Section 30(A)'s commands to be prohibitively "broad and diffuse" in considering potential Section 1983 enforcement. See *Sanchez*, 416 F.3d at 1060; p. 13, *supra*. Those same terms would be no less difficult to interpret and apply in the context of a private suit for injunctive relief brought under the Supremacy Clause or otherwise. Absent more specific guidance about how to measure a State's compliance with the general standards of economy, efficiency, quality of care, and beneficiary access to services, such determinations are ones properly made by HHS through the exercise of its expert judgment and through the mechanisms of its bilateral relationship with the State. See p. 4 n.1, *supra* (discussing proposed HHS regulations to guide and promote state compliance with Section 30(A)); 42 U.S.C. 1396a(a)(13)(A) (requiring States to have public process for determination of rates for institutionalized care).

As previously discussed (at page 3, *supra*), the Secretary is required to review and approve or disapprove the State's plan and any plan amendments (including HCBS waiver amendments) to ensure compliance with Medicaid Act requirements, including Section 30(A). If the Secretary disapproves a state plan or plan amendment, the State may seek reconsideration. And if the decision is upheld, the State may petition for judicial review in the court of appeals.

Apart from the plan-approval process, if the state plan does not comply with Section 30(A), the Secretary can also undertake a compliance action and withhold federal funds. That administrative process brings to bear "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking." *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment). And although the agency's action in approving or disapproving a state plan or amendment is subject to judicial review, the agency's interpretation and application of Section 30(A) are reviewed with substantial deference in such proceedings. See *Douglas*, 132 S. Ct. at 1210; *PhRMA*, 538 U.S. at 672-673 (Breyer, J., concurring in part and in the judgment); accord *Managed Pharmacy Care* v. *Sebelius*, 716 F.3d 1235, 1246-1250 (9th Cir. 2013) (applying *Chevron* deference to interpretation of Section 30(A) reflected in CMS's approval of State plan amendment), cert. denied, 134 S. Ct. 900, and 134 S. Ct. 986 (2014); *PhRMA* v. *Thompson*, 362 F.3d 817, 822 (D.C. Cir. 2004) (same).

By contrast, recognition of a private right of action under the Supremacy Clause would mean that multiple federal courts across different jurisdictions would

similarly (and perhaps simultaneously) be called upon to decide questions of compliance with Section 30(A). Judicial proceedings would move forward on different evidentiary records and would result in different factual findings, which would in turn be reviewable on appeal only under the "clearly erroneous" standard, Fed. R. Civ. P. 52(a)(6). And, as evidenced by the wide array of approaches the courts of appeals have taken in their interpretation of Section 30(A), U.S. Cert. Stage Amicus Br. at 10-11, *Douglas* v. *Indep. Living Ctr.*, *supra* (09-958), the proceedings would risk the development and application of different legal standards. See *Sanchez*, 416 F.3d at 1061 (noting "that exclusive agency enforcement might fit the scheme better than a plethora of private actions threatening disparate outcomes" (quotation marks and citation omitted)).

3. The conclusion that Section 30(A) is not enforceable through a private suit by Medicaid providers is, moreover, consistent with what apparently has been the shared assumption of the Court and Congress that no nonstatutory cause of action is available to challenge actions by state officials on the ground that they are inconsistent with SSA provisions governing state plans under cooperative federal-state programs.

a. In *Thiboutot*, *supra*, this Court first made explicit the conclusion that Section 1983—which renders actionable the "deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*," *ibid.* (emphasis added)—is presumptively available not only to redress violations of the Constitution or of statutes assuring equal protection, but also to redress violations of all federal statutes that confer individual rights, including statutes enacted pursuant to Con-

gress's Spending Clause authority. In addition to the plain language of Section 1983, the Court looked to its prior cases, which it read as resolving "any doubt" about the scope of the statute. *Thiboutot*, 448 U.S. at 4-5. The Court concluded that those cases, including several involving the SSA, had "relied on the availability of a § 1983 cause of action for statutory claims." *Id.* at 5-6. In all of those cases, the Court reasoned, Section 1983 "was necessarily the exclusive statutory cause of action because, as the Court held in [*Edelman* v. *Jordan*, 415 U.S. 651, 673-674 (1974)], the SSA affords no private right of action against a State." *Thiboutot*, 448 U.S. at 6.

If a nonstatutory cause of action fashioned under the Supremacy Clause or on another basis had been available, however, the critical premise underlying the Court's reasoning—that the Court's prior SSA cases had removed "any doubt" as to Section 1983's applicability to statutory claims—would have been unfounded. Each of the prior cases equally could have been explained as arising under a nonstatutory cause of action. See *Thiboutot*, 448 U.S. at 6 (string-citing cases seeking prospective relief from state programs alleged to be "inconsistent" with provisions of the SSA). A holding by this Court that a private cause of action *is* available under the Supremacy Clause to enforce provisions of the SSA would thus be in considerable tension with its ruling in *Thiboutot*.

Such a holding would also displace the Court's implied-right-of-action and Section 1983 jurisprudence, which looks to the terms and purposes of the particular statute involved, not to more general and amorphous standards drawn from elsewhere, such as the Supremacy Clause. This Court has previously ex-

pressed similar concerns in declining to recognize an extra-statutory cause of action. For example, in *Astra USA, Inc.* v. *Santa Clara County*, 131 S. Ct. 1342, 1345 (2011), the Court declined to recognize a third-party-beneficiary claim to enforce the terms of a contract between HHS and a drug company where the contractual terms were dictated by a federal-state cooperative program enacted under Congress's Spending Clause authority. There, as here, the parties did not dispute that there was no private right of action under the statutory provision at issue; the statute instead vested enforcement authority in HHS. *Id.* at 1347-1348. As a result, to allow a suit on a third-party-beneficiary rationale would have rendered meaningless the absence of a private right of action under the statute. *Id.* at 1348. Such a suit, the Court explained, "is in essence a suit to enforce the statute itself." *Ibid.* In those circumstances, the Court concluded, it would make "scant sense" to allow that claim to go forward "[n]o matter the clothing in which [the plaintiffs] dress their claims." *Id.* at 1345 (quoting *Tenet* v. *Doe*, 544 U.S. 1, 8 (2005)) (first brackets in original).

Similar considerations are present here. Under the Ninth Circuit's ruling, private parties who lack a statutory cause of action could simply re-style their suit as a preemption action to enjoin state officials from enforcing a state law that was adopted to implement the State's undertakings pursuant to a federal-state program. In *Suter*, for example, the plaintiffs' claim that the State had not made "reasonable efforts" at family reunification in its judicial proceedings, 503 U.S. at 352, could have been re-pleaded as a claim that the State's inadequate efforts were "preempted" by

the reasonable-efforts provision of the Adoption Act. In *Blessing*, the State's alleged failure to abide by Title IV-D's "substantial compliance" requirements, 520 U.S. at 332-333, would have been cognizable had plaintiffs instead challenged the State's program as "preempted" by the substantial-compliance provision. And in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), the plaintiffs could have pursued their claim that the State's policy of offering its driving-license examination only in English violated the Department of Justice's disparate-impact regulation, see *id.* at 279, by the simple expedient of filing suit under the Supremacy Clause instead of under Title VI of the Civil Rights Act of 1964.

That respondents here have sought only injunctive relief does not mitigate the inconsistency between private judicial enforcement and the federal-state cooperative scheme that Congress created, where Congress has not conferred individual rights or a private right of action. Significantly, in all of the cases mentioned above, the plaintiffs sought only prospective relief, not damages. *E.g.*, *Suter*, 503 U.S. at 352; *Blessing*, 520 U.S. at 337; *Sandoval*, 532 U.S. at 279; see *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 504 & n.4 (1990). But where Congress *has* conferred legal rights or immunities under such a statute, Section 1983 presumptively supplies an appropriate cause of action for either damages *or* equitable relief, as appropriate.[10] The court of appeals' decision dis-

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[10] Section 1983 does not provide a cause of action for damages against States or state employees in their official capacity. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989). And, unless properly abrogated, sovereign immunity would bar retrospective damages in cases asserting an implied statutory

places this coherent framework under the Medicaid Act.

b. Subsequent federal legislation reinforces the conclusion that no Supremacy Clause or other non-statutory cause of action should be recognized in this context. Two identical provisions of the SSA, added by Congress in 1994, point to the conclusion that the SSA is privately enforceable only when a cause of action lies under Section 1983 or is properly implied directly under the statutory provision at issue. After this Court's decision in *Suter*, which held that the "reasonable efforts" provision of the SSA's Adoption Act was not actionable either directly or under Section 1983, Congress adopted amendments to the SSA that provide:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter* v. *Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter* v. *Artist M.* that section 671(a)(15) of this title is not enforceable in a private right of action.

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right of action against state officials acting in their official capacity. See *Quern* v. *Jordan*, 440 U.S. 332, 337-349 (1979); *Edelman*, 415 U.S. at 677.

42 U.S.C. 1320a-2; see 42 U.S.C. 1320a-10 (similar). The Conference Report explained that "[t]he intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the [SSA] are able to seek redress in the federal courts to the extent they were able to prior to the decision in *Suter* v. *Artist M.*" H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. 926 (1994). The Report also made clear, however, that there was "no intent to overturn or reject the determination in *Suter* that the reasonable efforts clause to Title IV-E does not provide a basis for a private right of action." *Ibid.*

These amendments indicate that Congress, like the Court in *Suter*, was acting on the understanding that a private right of action should be available to enforce the state plan provisions of federal-state programs under the SSA only when such a cause of action is available under Section 1983 or established implied-private-right-of-action principles. Where a cause of action is not available under either Section 1983 or the particular SSA provision at issue, the amendments appear to contemplate that the provision simply will not be privately enforceable.[11]

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[11] In *Wilder*, this Court addressed the Boren Amendment, a former Medicaid Act provision requiring States to make payments based on rates that were "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities" that provide inpatient hospital, skilled nursing, and other institutional services. 42 U.S.C. 1396a(a)(13)(A) (1988). *Wilder* held that this provision created a right enforceable by Medicaid providers under Section 1983. 496 U.S. at 524. There was widespread criticism of that ruling. See *Governors' Proposal on Welfare and Medicaid: Hearings Before the Senate Comm. on Finance*, 104th Cong., 2d Sess. 88 (1996) (statement of Hon. Donna

4. Finally, respondents here face no affirmative enforcement action by the State, in which federal preemption would be a defense at law. Cf. *Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting); *VOPA*, 131 S. Ct. at 1642 (Kennedy, J., concurring). Nor do respondents seek immunity from allegedly preempted state regulation that the State seeks to impose on their primary conduct. The allegedly preempted reimbursement rates—or, more precisely, the State's allegedly preempted "failure to amend existing reimbursement rates," Pet. App. 21; see *id.* at 4 n.2—do not regulate respondents' primary conduct. Rather, the rates merely offer providers less money for certain services than what they believe should be paid under the cooperative federal-state Medicaid program. Section 30(A), however, is intended to serve broad and general programmatic interests of the federal government and the State, not to confer reimbursement rights on providers. The reimbursement relationship between a State and a provider is essentially contractual in nature. It would be anomalous for one party to a prospective or existing contract (a provider) to have a legal *right*—a cause of action—to insist that the other party (the State) increase its offer for a future contract or to increase its payments under an existing contract.

E. Shalala) ("We favor the repeal of the Boren Amendment. It has been the provider suits that have driven [States] crazy."). Congress repealed the Boren Amendment and replaced it with a more limited requirement that States provide for public participation in their ratemaking processes for such institutional services. See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 507-508 (42 U.S.C. 1396a(a)(13)(A) (cited at p. 23, *supra*)).

By contrast, almost all of the cases relied upon by respondents (see Br. in Opp. 11) and the court of appeals (see *Indep. Living Ctr. of S. Cal., Inc.* v. *Shewry*, 543 F.3d 1050, 1053-1055 (9th Cir. 2008)) involved claims for relief from state-law requirements or other burdens that were allegedly inconsistent with federal law.[12] In *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), for example, an airport owner sought to enjoin an ordinance imposing a curfew on jet aircraft, alleging that the ordinance was preempted by the Federal Aviation Act. *Id.* at 625-626. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), tanker vessel operators urged that state regulation of tanker operation and design was preempted by the federal Ports and Waterways Safety Act. *Id.* at 154-155. And in *Gade* v. *National Solid Wastes Management Association*, 505 U.S. 88 (1992), a trade association of regulated waste-removal businesses sought to enjoin enforcement of a state licensing requirement as

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[12] Since *Gonzaga*, this Court has decided only one case, *PhRMA*, in which a private party sued in federal court to enjoin state officials from enforcing an allegedly preempted state law in circumstances even arguably similar to those here. The basis for the plaintiff's cause of action was not addressed by the Court, cf. 538 U.S. at 683 (Thomas, J., concurring in the judgment), but the case differed in important respects from this one. There, the question was not whether the State had complied with obligations imposed as a condition of receiving federal Medicaid funds, but rather, whether the State's invocation of its Medicaid authority to impose independent regulatory requirements on drug manufacturers was consistent with the Medicaid Act. *Id.* at 649-650. Thus, unlike this case, the state law at issue in *PhRMA* constituted an affirmative exercise of the State's authority to create and enforce what were in essence regulatory requirements governing primary conduct. In bringing suit, the manufacturers were in effect asserting an immunity from those regulations.

inconsistent with federal law. *Id.* at 93-94.[13] Such decisions illustrate the traditional operation of the negative injunction applied in *Ex parte Young* that permits "'the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law.'" *Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) (quoting *VOPA*, 131 S. Ct. at 1642 (Kennedy, J., concurring)); see *Planned Parenthood of Kansas & Mid-Missouri* v. *Moser*, 747 F.3d 814, 829-830 (10th Cir. 2014).

Under the circumstances of this case, respondents cannot avail themselves of that equitable cause of action. They concededly are "not subject to or threatened with any enforcement proceeding like the one in *Ex parte Young*." *Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting). Rather, respondents "simply seek a private cause of action [that] Congress chose not to provide." *Ibid.*

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[13] See also, *e.g.*, *Verizon Md.*, 535 U.S. at 642-643 (challenge by telecommunication carrier to order of state utility commission); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001) (suit by tobacco companies challenging state restrictions on tobacco advertising); *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (challenge by utilities to conditions on construction of nuclear plants); *Fla. Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963) (suit by farmers challenging state law regulating sale of avocados).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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